STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

LULA ELEZOVIC,

Plaintiff-Appellant,

and

JOSEPH ELEZOVIC,

Plaintiff,

-vs-

FORD MOTOR COMPANY and DANIEL P. BENNETT, Jointly and Severally,

Defendants-Appellees.

_____/

Supreme Court No. 125166

Court of Appeals No. 236749

Lower Court No. 99-934515-NO

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

PROOF OF SERVICE

***** ORAL ARGUMENT REQUESTED *****

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Plaintiff-Appellant says "Yes".

Defendant-Appellant says "No".

II. DID THE CIRCUIT COURT ERR IN EXCLUDING AT TRIAL EVIDENCE OF THE INDECENT EXPOSURE CONVICTION OF DANIEL BENNETT AND FORD'S KNOWLEDGE OF THAT CONVICTION?

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Plaintiff-Appellant says "Yes".

Defendant-Appellant says "No".

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Plaintiff-Appellant says "Yes".

Defendant-Appellant says "No".

STATEMENT OF FACTS

This appeal arises out of charges of sexual harassment made by the plaintiff-appellant, Lula Elezovic against her employer, Ford Motor Company, and the supervisor at Ford's Wixom Assembly Plant who was responsible for that sexual harassment, Daniel Bennett. Before embarking on a recitation of the facts pertinent to this appeal, plaintiff feels compelled to advise the Court that many, if not most, of the facts of consequence to this case have been strenuously disputed. Because of the extraordinary divergence in the testimony presented at the trial in this matter, it is impossible in the confines of this brief to supply the Court with a single, unified view of the relevant facts.

This case comes before the Court following a circuit court decision granting a directed verdict in favor of both defendants and a Court of Appeals' decision affirming that ruling. In an appeal from such a ruling, courts are compelled to construe the evidence presented at trial as well as the inferences to be derived from that evidence in the light most favorable to the non-moving party, Mrs. Elezovic. *Kubczak v Chemical Bank & Trust Co.*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Matras v Amoco Oil Co.,* 424 Mich 675, 681; 385 NW2d 586 (1986). Because of the nature of this Court's review, this brief will confine itself to the evidence and the inferences favorable to Mrs. Elezovic.

Lula Elezovic was born in Yugoslavia and came to the United States in 1969 at the age of 15. (Apx. pg. 82a). Mrs. Elezovic first became employed at Ford in July 1978. (Apx. pg. 83a). In 1995, Mrs. Elezovic was employed as an inspector at the Ford Wixom plant.

In the summer of 1995, Mrs. Elezovic was ordered by her supervisor, Gary Zuback, to check a number of cars which were in the plant's rail yard. (Apx. pgs. 84a-85a). While Mrs.

Elezovic was waiting for another inspector to join her, Daniel Bennett, a Ford Wixom Quality Control Manager at the time, drove up to the area where Mrs. Elezovic was standing. (Apx. pg. 86a). Bennett called out to Mrs. Elezovic, asking her to come to his car. (Apx. pg. 87a). Mrs. Elezovic walked to the driver's side of Bennett car and she saw that Bennett had taken his penis out of his pants and was masturbating. As Mrs. Elezovic stood stunned next to the open window on the driver's side of Bennett's car, Bennett asked her to lick and suck his penis. (*Id.*).

Mrs. Elezovic backed away from Bennett's car and told him he was acting "crazy" and that he could get into trouble for exposing himself to her. (*Id.*). Bennett responded that if this incident were reported, it would be her word against his. (*Id.*) Mrs. Elezovic got back into her car and drove away from the rail yard. She was sufficiently upset by Bennett's conduct that she asked for and was given permission to leave work early.

Shortly after this incident which occurred in the rail yard, Mrs. Elezovic told several of her co-workers what Bennett had done. (Apx. pg. 114a). Two of these co-workers, Daniel Welch and Dave Perry, confirmed that shortly after the rail yard incident occurred, Mrs. Elezovic told them that Bennett had been masturbating in front of her. (Apx. pgs. 127a-129a). Mrs. Elezovic also told her salaried supervisors about this incident. In late 1995, Mrs. Elezovic told her supervisor, Mr. Zuback, in confidence that Bennett had been masturbating in front of her and that he had asked her to suck his penis. (Apx. pg. 111a). Mr. Zuback told Mrs. Elezovic that he was sorry about what she was going through, but he advised her to "just hang in there." (Apx. pg. 112a).

At approximately the same time, Mrs. Elezovic told another of her supervisors, Butch Vaubel, of Bennett's offensive conduct. (Apx. pg. 113a). Mrs. Elezovic expressed concern to

Mr. Vaubel that she could not continue working under these conditions. (*Id*). Fearing retaliation from Bennett if his misconduct were reported, Mrs. Elezovic asked both Mr. Zubak and Mr. Vaubel to keep these matters confidential. (Apx. pgs. 124a-125a). The reason that Mrs. Elezovic asked her supervisors to keep the information she had given them confidential was because of her fear that Bennett might retaliate against her if she formally complained. (Apx. pgs. 98a, 125a).

While Mrs. Elezovic asked her supervisors to keep her complaint confidential, her supervisors violated Ford's own anti-discrimination policies in doing so. Ford's anti-harassment policy mandates that supervisors, "[r]eport any incident of harassment or retaliation that you witness or become aware of to the appropriate Human Resources personnel." (Apx. pg. 323a). Ford supervisors had no discretion under Ford's policies, they were to "report *all* complaints of harassment or retaliation to the appropriate Human Resources personnel . . ." *Id* (emphasis in original). One of Mrs. Elezovic's supervisors, Butch Vaudel, conceded that if Mrs. Elezovic told him of the rail yard incident he violated company rules by not reporting it."

Meanwhile, on August 24, 1995, Bennett was driving his company-owned vehicle on I-275 when he approached a car with three teenage girls in it. Bennett motioned for the girls to look at him and, when they were close enough, the three girls saw that Bennett was making obscene gestures and masturbating.

The three girls immediately filed a police report and, after some investigation, Bennett was arrested on October 20, 1995, and charged with indecent exposure. Initially, Bennett agreed to pay a fine to dispose of these charges, but he later withdrew that offer. The indecent exposure charges were later tried before a judge who, in November 1995, found Bennett guilty of indecent

exposure.

Bennett's offensive conduct directed toward Mrs. Elezovic did not end with the masturbation incident in the rail yard. Shortly after Bennett received a promotion to the position of Superintendent of Predelivery, he approached Mrs. Elezovic licking his lips and again asking her to perform oral sex. He also asked her if her breasts were real and he told her that he would like to stick his penis between her breasts. (Apx. pg. 90a). When Mrs. Elezovic protested against this offensive behavior and asked Bennett to stop doing it, he reminded her that, if she attempted to report it, it would be her word against his. (*Id.*).

Bennett's sexually inappropriate conduct directed toward Mrs. Elezovic continued on almost a daily basis (Apx. pgs. 91a-92a, 332a-333a, 338a). When the two were in the plant with no one else around to observe them, Bennett would grab his crotch, playing with himself, asking Mrs. Elezovic to perform oral sex on him, and moving his tongue around his lips in a sexually suggestive fashion. (Apx. pgs. 337a-338a).

At the same time that Mrs. Elezovic was resisting Bennett's crude entrieties, she found herself being singled out for special, adverse treatment by Bennett. At one point, Mrs. Elezovic was bumped from her day shift job to what was for her a less desirable job working the afternoon shift. Mrs. Elezovic challenged that bumping and won her grievance. (Apx. pg. 100a-101a). Mrs. Elezovic also found herself not being assigned overtime work, a decision which she attributed to Bennett. (Apx. pg. 109a).

Mrs. Elezovic's contention that she was singled out for adverse treatment by Bennett was confirmed by her supervisor, Butch Vaubel. Mr. Vaubel described Bennett as constantly "birddogging" Mrs. Elezovic (Apx. pgs. 340a-341a). This meant that Bennett "stay[ed] right

on" Mrs. Elezovic, demanding that she do "everything right by the rules." (Apx. pg. 340a). Mr. Vaubel observed that Bennett was "always bothering" Mrs. Elezovic. (Apx. pg. 344a).

Because of the considerable job related stress which Mrs. Elezovic was experiencing, she began treating with a psychologist, Dr. Fran Parker. Dr. Parker began a long term professional relationship with Mrs. Elezovic in April 1997, treating her for symptoms of depression and anxiety. (Apx. pgs. 207a, 222a-223a). During the course of this treatment. Mrs. Elezovic gradually revealed the nature of Bennett's sexual misconduct. (Apx. pgs. 215a-218a).

As Mrs. Elezovic's treating psychologist, Dr. Parker communicated with management personnel at Ford Wixom on many occasions. For example, in September 1997, Dr. Parker wrote to Dr. Gregory Golicz, chief medical officer at Ford Wixom. (Apx. pg. 325a-326a). In that letter, Dr. Parker related that Mrs. Elezovic was being subjected to mental anguish at work due to her superintendent, Bennett. The letter stated that Mrs. Elezovic was descending into metal illness, "[d]ue to the harassment she perceived from Bennett . . ."

Approximately two months later, Dr. Parker wrote to Dr. Golicz again to express her concern over Mrs. Elezovic's mental health. (Apx. pg. 327a). This letter noted that Mrs. Elezovic had suffered certain physical injuries associated with a work related fall. But, the letter also referred to Mrs. Elezovic's emotional stress and indicated that Mrs. Elezovic "continues to feel uncomfortable with Dan Bennett."

Mrs. Elezovic's agitation and depression were sufficiently severe that Dr. Parker feared she would suffer a nervous breakdown. (Apx. pg. 220a). In April 1998, Dr. Parker took steps to remove Mrs. Elezovic from her job for a period of time. Thus, Mrs. Elezovic was off of work on a medical leave from April 30, 1998 to June 2 of that year. (Apx. pg. 221a). Dr. Parker

explained her reasons for recommending a medical leave in a letter she wrote to Jeffrey Haller, Ford Wixom's Plant Manager. (*Id.*). In her letter to Mr. Haller, Dr. Parker specified that Mrs. Elezovic was exhibiting mental anguish and that, "there has been harassment going on for the past year and a half at her Wixom plant job." (*Id*).

On August 28, 1998, Mrs. Elezovic told a Ford Wixom Labor Relations Representative, Peter Foley, that she had been frightened on her shift because Bennett "came near her and no one was around." (Apx. pg. 284a-285a). Mrs. Elezovic also told Mr. Foley that she feared that Bennett was going to do her bodily harm. (Apx. pg. 285a). Mr. Foley wrote a memo to his supervisor in Labor Relations, Jerome Rush regarding his discussion with Mrs. Elezovic. That memo stated: "I wonder if we could have a third party to determine how truthful this scared fragment is." (*Id*).

On September 30, 1998, Mrs. Elezovic placed a telephone call to the Labor Relations Department and spoke to Mr. Rush (Apx. pg. 292a). In that telephone call, Mrs. Elezovic complained that Bennett was harassing her and nobody was doing anything about it. (Apx. pgs. 292a-293a).

On October 6, 1998, Mrs. Elezovic was in Dr. Parker's office for one of the many sessions in which the two have engaged over the years. During that session, Mrs. Elezovic was discussing Bennett and the difficulties she was having with him. Mrs. Elezovic became so upset at this session that Dr. Parker decided to call Mr. Rush, the Supervisor of Ford Wixom's Labor Relations Department. Dr. Parker reported to Mr. Rush that Mrs. Elezovic was expressing suicidal thoughts as well as homicidal fantasies directed toward Bennett. Mr. Rush acted quickly in response to a perceived threat to Bennett. When Mrs. Elezovic reported for work later

that day she was prohibited from going on the plant floor (Apx. pgs. 286-287a). She was, instead, placed in an ambulance and taken to a hospital for psychological evaluation. (Apx. pg. 289a).

Mrs. Elezovic was off work on a medical leave for a period of two months. When she again reported for work on December 16, 1998, she was immediately suspended without pay for two weeks for her expressed homicidal fantasies involving Bennett.

In April 1998, Mrs. Elezovic's son-in-law, Paul Lulgjuraj, who is an attorney, wrote a letter to Mr. Rush in the Wixom Labor Relations Department. (Apx. pg. 328a). In that letter, Mr. Lulgjuraj complained of "ongoing acts of discrimination and retaliation" directed against Mrs. Elezovic. The letter further indicated that Mr. Lulgjuraj might be taking immediate legal action "to insure that our client is not subjected to working in a hostile environment."

One of the co-employees whom Mrs. Elezovic told about the incident in which Bennett exposed himself was Daniel Welch. In October 1998, Mr. Welch took a medical leave from his job. (Apx. pg. 132a). In conjunction with that leave, Mr. Welch met with Mr. Rush. (*Id*). Mr. Rush asked Mr. Welch when he intended to return to work. Mr. Welch responded that he was not coming back to work "until somebody did something with the situation down in my department between Bennett and Mrs. Elezovic." (Apx. pg. 133a). Mr. Rush asked Mr. Welch to prepare a written statement describing this situation, but he refused, citing his concern that if he made such a statement, he would be jeopardizing his job. (Apx. pg. 134a).

Another hourly co-worker who was aware of Mrs. Elezovic's difficulties with Bennett was Bradley Gotee (Apx. pg. 138a). In 1997, at a time when Mr. Gotee had noticed Mrs. Elezovic crying at the plant, Mr. Gottee was asked to report to the Wixom Labor Relations office

where he was interviewed by a Ford executive from corporate headquarters in Dearborn. (Apx. pg. 139a). The subject of this interview was Bennett. (Apx. pg. 140a). The interviewer wanted information about Mr. Bennett and asked Mr. Gotee if he "had seen anything in the shop" regarding Bennett. (Apx. pg. 142a). Mr. Gotee reported that he had not seen anything unusual.

In 1999, Bennett's sexual harassment of Mrs. Elezovic continued. During that year, Mrs. Elezovic was exiting a bathroom in one of the plant's buildings when Bennett came into the room, grabbed her by the arms and held her. (Apx. pg. 122a). Mrs. Elezovic reported this incident to a co-worker, Daniel Welch, who observed bruises on Mrs. Elezovic's arms where Bennett had grabbed her. (Apx. pg. 131a).

During the year 1999, Bennett seized the initiative. On April 21, 1999, he went to Peter Foley of the Labor Relations Department and asserted that Mrs. Elezovic and another Wixom employee, Justine Maldonado, were conspiring to bring false claims of sexual harassment against him. (Apx. pg. 296a). Mr. Foley told Bennett that nothing had been brought to his attention with respect to any such sexual harassment charges (*Id*). Mr. Foley did not even open a file to investigate the sexual harassment charges which Mrs. Elezovic and Ms. Maldonado were allegedly concocting. (*Id*). Mr. Foley's supervisor in Labor Relations, Mr. Rush, acknowledged that Mr. Foley's failure to open a file and to begin an investigation violated Ford's policies. (*Id*).

At approximately the same time, Bennett requested a meeting with Ezra Carter, Wixom's Human Resource Manager. (Apx. pg. 226a). At that meeting, Bennett expressed his concern that there were going to be false sexual harassment charges filed against him. (Apx. pgs. 226a-228a). Mr. Carter, however, did not contact Mrs. Elezovic with respect to Bennett's assertions. (Apx. pg. 229a). Mr. Carter told Bennett to get more information regarding his assertion that

Mrs. Elezovic was about to file false sexual harassment charges. (Apx. pg. 231a). Three to six months later, in September 1999, Bennett returned with a chronology which he had prepared describing an alleged conspiracy to wrongly accuse him of sexual harassment. (Apx. pgs. 229a, 231a).

Bennett's chronology prompted an investigation into his sexual harassment of Mrs. Elezovic. By this time, however, Mrs. Elezovic had retained an attorney to file a suit for sexual harassment. When interviewed in conjunction with the investigation, Mrs. Elezovic referred Ford's investigators to her attorney. (Apx. pgs. 234a-235a).

Ms. Elezovic filed this cause of action against Ford and Bennett individually in the Wayne County Circuit Court in October 1999. The case was assigned to Judge Kathleen MacDonald.

Even after the filing of the Complaint, Bennett's harassment of Mrs. Elezovic continued. On three separate occasions, Bennett followed Mrs. Elezovic in his car as she was leaving the plant at the end of her shift. (Apx. pgs. 115a-120a). Mrs. Elezovic was frightened by Bennett's following her and she drove her car at excessive speeds in an attempt to get away from him. (*Id.*)

Mrs. Elezovic was not the only Wixom Plant female employee who was subjected to Bennett's inappropriate sexual advances. In July 1998, another hourly employee, Justine Maldonado, was working at the plant when Bennett approached her in a vehicle and told her to get in his car. (Apx. pg. 150a). Once in the car, Bennett asked Ms. Maldonado to meet him in a rest area on I-96 after work. (*Id*). As he asked Ms. Maldonado these questions, Bennett pulled his penis out of his pants and asked her to perform oral sex on him. (Apx. pg. 151a).

Only a few days later, Bennett again ordered Ms. Maldonado to get into the car which he

was driving while on the Wixom Plant. (Apx. pg. 152a). When Ms. Maldonado got into his car, Bennett already had his penis out of his pants and he was touching himself. (Apx. pg. 153a).

Later, Ms. Maldonado was driving home when she noticed a car following her for some distance. (Apx. pg. 166a). When Ms. Maldonado's car was stopped at a traffic light, she saw that Bennett was the driver of the vehicle that was following her. Bennett told Ms. Maldonado to pull over. (Apx. pg. 167a). Ms. Maldonado pulled into a parking lot and Bennett walked to her car. He attempted to stick his hand down Ms. Maldonado's top and she slapped it away. (Apx. pg. 168a). Bennett persisted, asking Ms. Maldonado to go with him into some nearby woods and perform oral sex. (*Id.*). Ms. Maldonado refused and was able to drive away. As she did so, she saw that Bennett was masturbating. (Apx. pg. 169a).

Ms. Maldonado was initially reluctant to report these incidents involving a plant superintendent. However, in October 1998, Ms. Maldonado reported the incidents to a member of Ford's Labor Relations Department as well as to Joseph Howard, one of the plant's Operation Managers. (Apx. pg. 171a-172a). Despite her reporting of these incidents, no investigation of her charges against Bennett was initiated. (Apx. pg. 172a).

Approximately one year later, Ms. Maldonado went back to the plant's Labor Relations Department and again complained about Bennett's conduct toward her. The Labor Relations Representative to whom Ms. Maldonado spoke was not overly optimistic about her prospects in registering such a complaint. He advised Ms. Maldonado that it would be Bennett's word against hers and, as a result, her charges would probably not be investigated. (Apx. pg. 174a). His prediction proved true; Ms. Maldonado's complaint triggered no investigation.

In June 2000, after Ms. Maldonado also filed suit against Ford and Bennett, Bennett was

placed on a leave of absence with pay.

In anticipation of the trial, the defendants filed a joint motion *in limine* requesting that the court exclude at trial any evidence relating to Bennett's arrest and conviction for indecent exposure arising out of the August 1995 incident on I-275. In their motion, the defendants argued that such evidence was inadmissible under MRE 404(b) and/or MRE 403.

On January 19, 2001 the circuit court ruled that evidence of the indecent exposure conviction could not be admitted against Bennett under MRE 404(b). (Apx. pg. 66a). The court further ruled that this evidence would not be allowed in Mrs. Elezovic's claim against Ford on the basis of MRE 403. (Apx. pgs. 67a).

Trial in this matter was scheduled for August 2001. Shortly before the trial was to begin, Mrs. Elezovic's counsel found out about yet another Ford Wixom female employee, Pamela Perez, to whom Bennett has exposed himself. Ms. Perez was not on plaintiff's witness list. As a result, plaintiff's counsel filed a motion seeking to amend her witness list to include this new witness. Originally, this motion was granted by the trial judge's alternate and Ms. Perez's deposition was taken. In that deposition, Ms. Perez testified to a number of sexually charged incidents instigated by Bennett. The most serious of these involved an occasion in which Ms. Perez had to pick up something from Bennett's office. While she and Bennett were alone in his office, Bennett suddenly pulled out of his pocket a wad of money and he told Ms. Perez that she could keep all of the money if she booked a room at a local hotel and waited for him there. As he made this proposition to Ms. Perez, Bennett pulled his penis out of his pants and began stroking it in front of her. He then added that she could keep all of the money if she was willing to "take care of" him immediately.

The defendants filed a motion for reconsideration with respect to the decision to allow plaintiff to add Ms. Perez to the witness list. A hearing was held on that motion on August 6, 2001, twelve days after Ms. Perez had been deposed. On reconsideration, the assigned trial judge ruled that Ms. Perez could not be added to plaintiff's witness list. As a result of this ruling, Ms. Perez did not testify at trial.

A jury trial began in this matter on August 13, 2001. At trial Mrs. Elezovic presented four theories of recovery. She asserted a claim of sexual harassment based on the existence of a hostile work environment. She also claimed *quid pro quo* sexual harassment. Additionally, she sought damages for gender discrimination and wrongful retaliation.

On the ninth day of trial, the plaintiff rested. Ford's counsel immediately indicated that she had prepared a written motion for directed verdict. Rather than hearing and deciding Ford's motion at that time, the trial court determined that the plaintiff would be allowed to file a written response to Ford's motion for directed verdict. Plaintiff filed such a response two days later.

While the motion for directed remained pending, the defendants presented their proofs, consisting of seven witnesses, including Bennett. In his trial testimony, Bennett denied every single act of sexual impropriety which had surfaced during the course of the trial. (Apx. pgs. 201a-205a).

On August 29, 2001, the defendants completed their proofs. The following day, the court addressed on the record the motion for directed verdict. The circuit court decided that the entirety of the plaintiff's case would be dismissed for lack of evidence. (Apx. pgs. 58a-62a).

With respect to Mrs. Elezovic's hostile environment claim against Ford and Bennett, the trial court ruled that a directed verdict was required because there was insufficient evidence with

respect to Ford's notice of the harassment which was taking place:

> "As to the hostile work environment, I don't think you can prove pervasiveness by some of the proofs that have come into this case. The hostile environment requires notice to the employer or vicarious liability. In this case although the plaintiff has testified that not only there was this '95 incident, but there was – well, she changed her testimony from daily to at least three or four times where it was alleged the defendant touched himself inappropriately and made facial expressions at her.
>
> The fact of the matter is that there was no notice to Ford. This 1998 letter to Mr. Rush, if it went to him, from the son-in-law, the defendant never made mention of any sexual harassment. And again, the only people she told were supervisors. Under normal circumstances I would agree that that would be enough. But in this case it was told to them in confidence. She asked them not to repeat it. And again, she complained that she couldn't come forward because of her culture.
>
> I think in this case there is a significant lack of proof, and your motion is granted in total."

(Apx. pgs. 61a-62a).

An Order Granting Defendant's Motion for Directed Verdict was signed on August 30, 2001. (Apx. pgs. 36a-37a).

Mrs. Elezovic appealed the August 30, 2001 Order to the Michigan Court of Appeals. On October 23, 2003, a panel of that Court issued a decision affirming the circuit court's directed verdict against Ford and affirming the circuit court's evidentiary rulings. *Elezovic v Ford Motor Company*, 259 Mich App 187; 673 NW2d 776 (2003); (Apx. pgs. 41a-56a). With respect to Mrs. Elezovic's sexual harassment claim against Bennett, the Court of Appeals majority held that it was required to reject Mrs. Elezovic's claim on the basis of a prior panel decision in *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464; 652 NW2d 503 (2002). (Apx. pgs. 46a-

48a).

The Court of Appeals affirmed the circuit court's decision granting a directed verdict to Ford on Ms. Elezovic's hostile environment claim on the ground that there was insufficient evidence to establish notice. (Apx. pgs. 43a-45a). The Court of Appeals further ruled that the trial court did not abuse its discretion in deciding the evidentiary issues raised on appeal by the plaintiff (Apx. pgs. 50a-53a).

ARGUMENT

I. THE MICHIGAN STATUTE WHICH PROHIBITS SEXUAL HARASSMENT IN THE WORKPLACE PROVIDES A CAUSE OF ACTION AGAINST AN INDIVIDUAL RESPONSIBLE FOR SUCH HARASSMENT.

Mrs. Elezovic brought a cause of action against Daniel Bennett, the man who sexually harassed her. While her appeal was pending in the Court of Appeals, a panel of that Court issued its decision in *Jager v Nationwide Truck Brokers*, 252 Mich App 464; 652 NW2d 503 (2002). In *Jager*, the panel determined that an individual responsible for sexual harassment in the workplace may not be sued for such harassment under the Elliott-Larsen Civil Rights Act. On the basis of MCR 7.215(J), the Court of Appeals in this case was compelled to follow the ruling announced in *Jager*. 259 Mich App at 200-202.

The essence of the *Jager* opinion is that the Michigan Legislature went to the trouble of passing a statute which was designed to eliminate sexual harassment from the workplace setting but, in doing so, the Legislature somehow neglected to make the person who was responsible for that harassment liable for the conduct which was being prohibited. This reasoning has little to recommend it in light of the obvious anti-sexual harassment policy identified in Michigan's civil rights statute. *See* MCL 37.2102(1); MCL 37.2103(i). More importantly, the conclusion reached by the panel in *Jager* completely ignores the unequivocal text of the statutes which define who is subject to the Act.

Whether Bennett can be sued for his sexual harassment of Mrs. Elezovic represents a question of statutory interpretation. It is, therefore, appropriate to begin with the relevant provisions of the statute. Michigan law prohibits sexual harassment in the workplace. The

Elliott-Larsen Act specifically defines sexual harassment as discrimination based on sex. MCL 37.2103(i). The provision of the Act which prohibits all forms of sex discrimination in the employment setting is MCL 37.2202(1), which states in relevant part, "an ***employer*** shall not . . . discriminate against an individual with respect to employment . . . because of . . . sex. . ." *Id.* (emphasis added). Thus, the anti-discrimination provision of MCL 37.2202(1) operates against *employers*.

The Elliott-Larsen Act includes its own set of definitions, some of which apply to the entire Act, *see* MCL 37.2103, and some of which apply only to article 2 of the Act, the section of the Act which prohibits discrimination in employment. *See* MCL 37.2201. The statutory definition which is of central importance to this case is contained in MCL 37.2201(a). It is that provision which defines "employer". MCL 37.2201(a) states:

> 37.2201 Definitions
>
> Sec. 201. As used in this article:
>
> (a) "Employer" means a person who has one or more employees, and ***includes an agent of that person.***

One of the words contained in MCL 37.2201(a)'s definition of an employer - the word "person" - is itself defined in the Elliott-Larsen Act. That definition is found in MCL 37.2103(g), which states:

> "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity.

There is, of course, no doubt that Ford Motor Company is an "employer" for purposes of

article 2 of the Elliott-Larsen Act. Ford is an "employer" because it is a "person" as defined in MCL 37.2103(g), *i.e.* a corporation, and it has more than one or more employees. But, what is equally obvious is that the word "employer" for purposes of article 2 of the Act must also include Bennett, who was without question an agent of Ford Motor Company. Since Bennett, the individual perpetrator of the sexual harassment involved in this case, was an agent of Ford, he is under MCL 37.2201(a), an "employer" for purposes of the conduct which is prohibited in MCL 37.2202(1).

It is axiomatic that in construing statutory language, "when a statute specifically defines a given term, *that definition alone controls*." *Tryc v. Michigan Veterans' Facility*, 451 Mich 129; 136; 545 NW2d 642 (1996) (emphasis added); *Vargo v. Sauer*, 457 Mich 49, 58-59; 576 NW2d 656 (1998). Here, the Legislature has adopted a legislative scheme which prohibits *employers* from engaging in sexual harassment and the Legislature has explicitly defined the term "employer" in such a way that it extends beyond corporate employers. There can be no debate that Bennett, as an agent of Ford, is an "employer" for purposes of the prohibitions contained in MCL 37.2202.

Despite the clarity of the language contained in the Michigan Legislature's definition of the term "employer" in MCL 37.2201(a), a panel of the Court of Appeals in *Jager* was somehow led to the conclusion that "[t]he mere fact that MCL 37.2201 defines 'employer' as including an agent does not automatically authorize a claim against an agent." 252 Mich App at 485, *citing Meager v Wayne State University*, 222 Mich App 700; 565 NW2d 401 (1997). This is a truly remarkable statement to be emanating from a Michigan appellate court at the present time. In making this statement, the panel in *Jager* implicitly acknowledged that, as MCL 37.2201(a) is

written, an agent who is responsible for sexual harassment is himself an "employer" for purposes of the Elliott-Larsen Act. Yet, at the same time, the Court in *Jager* considered itself free to ignore the express language of MCL37.2201(a) in arriving at its ultimate holding. The panel in *Jager* was not free to disregard the legislatively imposed definition of the term "employer" contained in MCL 37.2201(a). *Tryc, supra*; *Vargo, supra.*

The *Jager* panel's failure to give effect to the clear language of MCL 37.2201(a) is particularly mystifying in an era in which this Court has provided frequent, unequivocal reminders of the limited role which courts are to play in the interpretation and application of statutes. This Court has instructed that "a clear and unambiguous statute requires full compliance with its provisions as written." *Roberts v Mecosta County General Hospital*, 466 Mich 57, 66; 642 NW2d 663 (2002). If a statute's language is clear, "we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 686 (2001). Courts and litigants have also been regularly reminded that the role of the judiciary is not to engage in legislation, *Tyler v Livonia Schools*, 459 Mich 382, 392-393, n. 10; 590 NW2d 560 (1999), and that, "because the proper role of the judiciary is to interpret, not write the law, courts do not have authority to venture beyond the unambiguous text of a statute." *State Farm Fire & Casualty Company v Old Republic Insurance Company*, 466 Mich 142, 146; 644 NW2d 715 (2002).

This Court has stressed that, to avoid infringing on the constitutional powers vested solely in the Legislature, courts must adopt a strictly textual approach to the construction of statutes:

> These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary

> from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences.
>
> *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

The *Jager* decision represents everything that the majority of this Court has set itself against over the last five years. The *Jager* court sought to ascertain the "intent" of the Michigan Legislature in enacting MCL 37.2201(a) not from the words which were actually incorporated into that statute. Instead, the *Jager* court looked elsewhere, particularly to federal court decisions construing federal civil rights statutes, in adopting an interpretation of this statute which cannot be harmonized with its text.

The *Jager* Court insisted on examining federal precedents construing provisions of the federal civil rights law. This reliance on federal precedents in the face of an unequivocal Michigan statute is extremely difficult to understand. The federal court precedents which formed a substantial basis for the panel decision in *Jager* can do nothing to change the unequivocal language of MCL 37.2201(a). What is even more mystifying is that the approach to the interpretation of statutes employed in the federal court cases on which the *Jager* panel relied is either completely inapplicable to Michigan's civil rights statute or completely antithetical to this Court's jurisprudence regarding the appropriate interpretation of statutes.

The panel in *Jager* placed enormous emphasis on the Sixth Circuit's 1997 decision in *Wathan v General Electric Co.*, 115 F.3d 400 (6th Cir. 1997), in which that Court found no individual liability in an action brought under Title VII of the federal civil rights act. The

Wathan Court was considering the definition of "employer" which is contained in 42 USC §2000e(b). That definition states: "the term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . ." The Court in *Wathan* held that this language did not allow for a cause of action against the individual harasser. 115 F3d 403-406.

In relying on the *Wathan* holding, the *Jager* Court remained oblivious to the fact that the Sixth Circuit in *Wathan* fully acknowledged that *a textual approach to the language contained in Title VII would lead to the conclusion that an individual could be held liable for acts of discrimination under that Act*. In the course of its decision, the Sixth Circuit acknowledged in *Wathan* that, "a narrow, literal reading of the agent clause in [Title VII] does imply that an employer's agent is a statutory employer for purposes of liability." 115 F3d at 405. Thus, the Sixth Circuit conceded in *Wathan* that a textual approach to the interpretation of a comparable[1] provision of Title VII would support the view that an individual could be found liable under that act for acts of discrimination including sexual harassment. Yet, the Sixth Circuit, citing the "object" and "policy" behind Title VII, ruled in that case that it could go beyond the pure text of the statute and, ultimately render a decision which was in conflict with a literal reading of that text.

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[1]Plaintiffs would stress that the text of Title VII's definition of "employer" and that contained in MCL 37.2201(a) is different. Plaintiff would further suggest that, from a purely textual standpoint, the text of Michigan statute more clearly expresses the fact of individual liability. However, the Court's job in this case is not to compare and contrast federal and state statutes. The Court's function is to apply the Michigan statute as the Michigan Legislature wrote it.

The *Wathan* Court's admission that its interpretation of the Act was not based on the actual language used in Title VII is mirrored in another federal appellate decision cited in *Jager*, *Tomka v Seiler Corporation*, 66 F3f 1295 (2nd Cir 1995). In *Tomka*, the Second Circuit conceded that, "a narrow, literal reading of the agent clause in §2000e(b) does imply that an employer's agent is a statutory employer for purposes of [Title VII] liability." 66 F3d at 1314. Despite this observation, the Second Circuit ruled in *Tomka* that a non-textual reading of the statute was appropriate because the "intention" of Congress controlled, "rather than the strict language" of the statute. *Id.*

The approach employed by the Sixth Circuit in *Wathan* and the Second Circuit in *Tomka* is completely contrary to that which this Court has repeatedly prescribed in the interpretation of Michigan statutes. The observation contained in these two cases that a textual examination of Title VII fully supports the notion of individual liability should have naturally led the *Jager* panel to the conclusion that the Michigan statute means precisely what it says and that an agent of an employer is under the definition provided in MCL 37.2201(a) an employer for purposes of Michigan's civil rights statute.

There are, however, numerous other reasons why the *Jager* Court's insistence on following federal court precedents rather than the clear text of MCL 37.2201(a) is patently wrong. The federal courts which have construed the federal civil rights acts as inapplicable to individuals have offered basically five different reasons why they have deviated from the literal text of the statute and construed the act in this way. *See* S. Connolly, *Individual Liability of Supervisors for Sexual Harassment Under Title VII: Court's Reliance on Rules of Statutory Construction,* 42 BCL Rev 421, 434-435 (2000) (hereinafter: "Connolly").

First, federal courts have ruled that the "scheme" of Title VII does not allow for individual liability. Focusing on the fact that Title VII's definition of "employer" extends only to persons or entities who employ fifteen or more people, these courts have suggested that Congress could not have intended to apply the prescriptions of Title VII to the individual agent of an employer. *See e.g. Wathan*, 115 F3d at 406; *Tomka*, 66 F3d at 1314; *Miller v Maxwell's International, Inc.*, 991 F2d 583, 587 (9th Cir 1993).

Even if the "scheme" of a civil rights act could, under the textualist jurisprudence of this Court, allow for the literal language of a statute to be disregarded, the fact remains that this rationale offered by federal courts as to the reach of Title VII is of no value in interpreting Michigan's Elliott-Larsen Act. This is because the Elliott-Larsen Act, unlike the federal statute, has no fifteen employee minimum. Michigan's civil rights statute applies to large employers such as Ford, as well as employers with only a single employee. Thus, there is nothing in the "scheme" of the Michigan statute which indicates that its prohibitions could not be applied to an individual.

In rejecting the application of Title VII to individuals, several federal courts have also cited the limited, equitable remedies which were originally available under that act. *See* Connolly, 42 BCL Rev at 434. Thus, some federal courts have reasoned that these limited equitable remedies including reinstatement are the type of remedies which only an employer could be compelled to provide. Again, this argument has no applicability to the appropriate interpretation of the Michigan civil rights act, since the damages available under Michigan's statute have always included legal damages, not merely equitable relief.

Federal courts have also supported the view that Congress did not intend to make

individuals liable under Title VII by pointing to the "noticeable absence of any mention of agent liability in the floor debates over §2000e(b)." *Tomka*, 66 F3d at 1314; *see also Wathan*, 115 F3d at 406. Thus, these federal courts have suggested that if Congress intended to impose individual liability for civil rights violations, there would have been greater consideration given to this issue in the legislative history.

While this interpretive method based on what is *not* contained in a statute's legislative history may be of value to federal courts construing federal statutes, there is no doubt that under this Court's precedents, this approach cannot be employed in interpreting an act of the Michigan Legislature. This Court considered and categorically rejected precisely the same sort of analysis in *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

Prior to *Robinson*, the Court had previously considered the phrase "the proximate cause" in MCL 691.1407 in *Dedes v Asch*, 446 Mich 99; 521 NW2d 488 (1994). In *Dedes*, the Court's majority ruled that if the Michigan Legislature intended to require that a governmental agent's gross negligence had to be *the* proximate cause of the plaintiff's injury, there would have been much greater indication in the legislative history of the statute reflecting such a dramatic change in the law. 446 Mich at 113-116. In *Robinson*, this Court rejected such an approach to the interpretation of a Michigan statute:

> The majority in *Dedes* interpreted the phrase "the proximate cause" to mean "a proximate cause." It did this on the basis of an analysis that not to do so would produce a marked change in Michigan law, and that the Legislature, in its "legislative history," gave no indication that it understood that it was making such a significant change. *This approach can best be described as a judicial theory of legislative befuddlement.* Stripped to its essence, *it is an endeavor by the Court to use the statute's "history" to contradict the statute's clear terms.* We believe the Court had no authority to

do this.

462 Mich at 459-460 (emphasis added)..

Robinson, therefore, directly refutes another rationale offered by federal court's for their decidedly non-textual interpretation of the federal civil rights acts. *Cf. Donajkowski v Alpena Power Company*, 460 Mich 243, 261; 596 NW2d 574 (1999) ("sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.") (emphasis in original).

Finally, federal courts in interpreting 42 USC §2000e(b) have also suggested that it is "inconceivable" in light of the structure of Title VII that Congress would have intended to impose individual liability. *Tomka*, 66 F3d at 1314; *Miller*, 991 F2d at 587. Thus, these courts have suggested that the literal text of the statute should give way because application of the literal text might lead to absurd results. Connolly, 42 BCL Rev at 435.

Again, the interpretive approach used in these federal cases is directly at odds with the decisions of this Court. This Court has categorically rejected the notion that a court may disregard the literal text of the statute where that literal text arrives at an absurd or illogical conclusion. *McIntire*, 461 Mich at 156; *Piccalo v Nix*, 466 Mich 861; 634 NW2d 233 (2002); *People v Javens*, 469 Mich 1025, 1026; 677 NW2d 329 (2004) (J. Young, concurring); *Buzzitta v Larizza Industries, Inc.*, 465 Mich 975; 641 NW2d 593 (2002) (J Corrigan, concurring). While a federal court may be able to conclude that the literal language of a statute may be adjusted to avoid absurd or illogical results, that path is not open to a Michigan court.

Finally, most of the federal courts which have addressed this question have suggested that the congressional *purpose* in including the words "and any agent of such person" in 42 USC

§2000e(b) was to reinforce the notion of an employer's vicarious liability. *Tomka*, 66 F3d at 1316; *Wathan*, 115 F3d at 405-406. The *Jager* Court seemed particularly impressed with this derivative divination of what the Michigan Legislature meant in drafting MCL 37.2201(a). The *Jager* Court declared, "we believe that . . . the language in the definition of 'employer' concerning an agent of the employer was meant merely to denote *respondeat superior* liability, rather than individual liability." 252 Mich App at 484.

The *Jager* Court's analysis of the Michigan Legislature's "purpose" in drafting MCL 37.2201(a) also runs afoul of this Court's consistent commitment to statutory text. This Court has stressed that it is the *language* of a statute which must control, not an individual court's formulation of the "purpose" or "intent" of the Legislature in drafting the statute as it did. This Court explicitly condemned such a method of statutory interpretation in *Gilbert v Second Injury Fund*, 463 Mich 867; 616 NW2d 161 (2000), where it reversed a Court of Appeals' panel which engaged in similar non-textual interpretation of a statute based on a perceived legislative purpose:

> Without noting any ambiguity in the statutory language, the Court of Appeals decided not to apply MCL 418.372(2); MSA 17.237(372)(2) *because it did not think that the statutory purpose would be advanced. This mode of analysis contravened the judiciary's limited role of complying with the will of the Legislature as reflected in the plain language of statutes.*
>
> *Id.* at 867 (emphasis added).

Thus, as this Court made clear in *Gilbert*, statutory interpretation is not to be guided by what one court decrees to be the "purpose" of a statute.[2] Rather, it is the text chosen by the Legislature

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[2]The lack of reliability associated with a judicial search for legislative "purpose" can be easily demonstrated in this case. The *Jager* Court identified one potential "purpose" of the

which must control a court's interpretation of an act of the Michigan Legislature.

There is one additional reason why, under the precedents of this Court, the *respondeat superior* theory announced in several federal courts and embraced by the Court of Appeals in *Jager* must be rejected. The simple fact is that a corporation can only act through its agents. *See Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 213; 476 NW2d 392 (1991); *People v American Medical Centers of Michigan Ltd*, 118 Mich App 135, 156; 324 NW2d 782 (1982). It is equally well established that, "a party is responsible for any action or inaction by the party or the party's agent." *Alken-Ziegler, Inc. v Waterburg Headers Corp.*, 461 Mich 219, 224; 600 NW2d 638 (1999). These rather fundamental principles of corporate liability mean that if the only purpose of the operative language of MCL 37.2201(a) was to denote an employer's liability for the misconduct of its agent, that provision could have been written without the words "and includes an agent of that person," and that provision would have precisely the same meaning.

To accept the *Jager* Court's adoption of federal court precedents regarding vicarious liability would render the words "includes an agent of that person" completely superfluous. This fact was noted in a recent federal district court decision critical of the *Jager* decision, *United States v Wayne Co. Community College*, 242 F Supp2d 497 (ED Mich 2003):

> "[T]his Court does not necessarily endorse the Michigan Court of Appeals' interpretation of the language in the Elliott-Larsen Act in *Jager*, as it believes that the language 'includes an agent of that employer,' could, under principles of strict statutory construction, well be read as extending liability to individuals. Otherwise, this

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statute in arriving at its decision that the Elliott-Larsen Act did not apply to individuals. The *Jager* Court could just as easily have identified another legislative "purpose", the eradication of all forms of sexual harassment in the workplace setting, to arrive at the conclusion that the Michigan Legislature must have intended that the prohibitions in the Act would apply to individuals.

> phrase is merely surplusage, as it adds nothing to the definitional scope of "employer," which itself defines the term 'employer' as a person."

Id. at 507.

This Court has held in numerous cases that adherence to the literal text of a statute compels a court to avoid any construction of statutory language which would render any part of a statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999) ; *Maskery v Board of Regents*, 468 Mich 609, 618; 664 NW2d 165 (2003). *Jager*'s nontextual reading of Michigan's sexual harassment statutes violates this fundamental principle as well.[3]

For all of the reasons detailed herein, the *Jager* Court's construction of MCL 37.2201(a)

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[3]From a textualist perspective, there is one other ramification of *Jager*'s *respondeat superior* ruling which this Court should consider. If *Jager* is correct and the language of MCL 37.2201(a) was meant only to denote *respondeat superior* liability, this would mean that the Elliot-Larsen Act has, in fact, directly addressed the question of a corporate defendant's vicarious liability. What is notable is that this purported formulation of respondeat superior liability allegedly contained in MCL 37.2201(a) has no exceptions - an employer is responsible for the acts of its agents. This Court has in several cases adopted a view of *respondeat superior* liability in sexual harassment cases which is premised on common law agency principles. *See Chambers v Trettco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000); *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993). Based on these common law principles, this Court has ruled that liability for a sexual harassment claim premised on a hostile work environment can only succeed if the plaintiff proves the additional element of "respondeat superior". 463 Mich at 311. In a hostile environment sexual harassment case, this *respondeat superior* requirement has been interpreted by this Court as requiring in addition to wrongful acts on the part of an agent, proof that the employer had "notice" of these wrongful acts. This additional common law based "notice" requirement is, however, difficult to sustain if *Jager*'s interpretation of MCL 37.2201(a) were correct. If *Jager* is, indeed, correct, this means that the Legislature has spoken on the issue of *respondeat superior* in a cause of action under the Elliot-Larsen Act. And, assuming *Jager* is correct, the Legislature has done so without imposing any further requirements for *respondeat superior* liability, including any suggestion that "notice" is a necessary precondition to a corporation's liability under the Act. Thus, if the *Jager* opinion is correct with respect to MCL 37.2201(a), this Court must re-examine the common law based limitations which it has imposed on an employer's vicarious liability in *Chambers* and *Radtke*.

is wrong. This Court should do what is has consistently instructed the judges of this State to do; it should apply this statute as it is written. Doing so, the Court must conclude that Bennett can be sued under the Elliot-Larsen Act for his sexual harassment of Mrs. Elezovic.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S EXCLUSION OF EVIDENCE CONCERNING BENNETT'S 1995 CONVICTION FOR INDECENT EXPOSURE AND THE FACTS ASSOCIATED WITH THAT CONVICTION.

On August 23, 1995, three teenage girls were driving on I-696 when they noticed a male driving in a blue Lincoln who appeared to be following them. The three girls became more apprehensive when the Lincoln continued to follow them as they exited onto I-275. The girls observed the Lincoln driving close to their car and the Lincoln's driver waving at them and beeping his horn. The driver of the Lincoln appeared to be signaling for them to get off the freeway. He pulled alongside the girls' car and began waving and pointing at his groin area. All three girls saw that the driver of the Lincoln was masturbating.

The three girls recorded the license number of the Lincoln and reported the incident to the Wixom Police Department. The girls were also able to provide a description of the masturbating driver, a description that matched Daniel Bennett. The Wixom Police determined from the information which the girls provided that the vehicle was registered to the Ford Wixom Plant. Within hours of the time that this incident occurred, Wixom Police Officers went to that plant to obtain the identity of the man who was driving the Lincoln. The plant's Head of Security advised the officers that Bennett had been assigned the vehicle at the time of the incident.

Police records indicate that on August 30, 1995, Bennett was interviewed by the State Police officer assigned to this matter, Detective Sergeant Gorno. When told of the facts which

the three teenagers had provided the police, Bennett immediately denied their assertion that he had exposed himself and masturbated in front of them. However, in the course of his interview with Detective Gorno, Bennett expressed an interest in paying a fine and putting the matter behind him. Asked to sign a statement at the end of that interview, Bennett wrote, "The discussion was held with Mr. Gorno & will handle the matter by payment of a fine."

Bennett, however, did not resolve the matter in this way. He was arrested on a charge of indecent exposure on October 2, 1995. A bench trial was conducted on these charges and, on November 15, 1995, Bennett was convicted of the crime of indecent exposure. His sentence required both the payment of a fine and that he undergo psychiatric therapy.

Ford and Bennett filed a motion in limine in this case seeking to exclude at trial any reference to Bennett's arrest and conviction for indecent exposure. The circuit court ruled that evidence of Bennett's indecent exposure conviction was not admissible as to Mrs. Elezovic's claim against Bennett under MRE 404(b). (Apx. pg. 66a). With respect to Mrs. Elezovic's claim against Ford, the circuit court ruled that this evidence, while potentially relevant on the issue of notice, was to be excluded on the basis of MRE 403 because, in the court's view, "the prejudice to Ford Motor substantially outweighs any probative value this evidence might have." (Apx. pgs. 66a-67a). In reaching this result, the circuit court acknowledged that it might reconsider this pretrial ruling if plaintiff's remaining evidence with respect to notice proved inadequate. The circuit court indicated that "there may be other means of proving notice other than this conviction. If there's not, I may reconsider it." (Apx. pg. 68a).

Ms. Elezovic challenged these evidentiary rulings in her appeal to the Michigan Court of Appeals. That Court found that there was no abuse of discretion in the trial court's refusal to

admit this evidence. (Apx. pgs. 50a-52a).

A. The Admissibility Of This Evidence As It Pertains To Plaintiff's Claims Against Ford.

The trial court granted a directed verdict on Mrs. Elezovic's sexual harassment claims against Ford on the ground that there was insufficient evidence presented at trial on the question of Ford's notice of Bennett's sexual harassment of Mrs. Elezovic. (Apx. pgs. 61a-62a). The substance of that ruling will be addressed in Issue III, *infra*. Before proceeding to that question, however, the Court must consider the impact of the trial court's pretrial ruling refusing to admit evidence of Bennett's 1995 indecent exposure conviction and Ford's knowledge of that conviction. The entire character of plaintiff's evidence on the notice issue was dramatically affected by the trial court's pretrial ruling precluding the admission of this evidence. Indeed, Bennett's indecent exposure conviction and Ford's knowledge of that conviction represented the essential prism through which all of the other evidence bearing on notice had to be viewed.

To understand why Bennett's conviction was so critical to the notice question, the Court must begin with an analysis of the legal standard which governs the notice element in a hostile environment sexual harassment claim. This Court addressed that issue in *Chambers v Trettco, Inc.*, 463 Mich 297; 614 NW2d 910 (2000), where it held that an employer could be held liable on a hostile environment claim where it failed to take appropriate remedial action after receiving adequate notice that the plaintiff was being sexually harassed. *Id.* at 319. In *Chambers,* this Court established the following standard for determining whether notice of a hostile work environment was "adequate" to impute liability to a corporate employer:

> Therefore, notice of sexual harassment is adequate if, *by an objective standard, the totality of the circumstances were such that*

a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.

Id. at 319 (emphasis added).

There are two important components of the notice standard set out in *Chambers*. First, the standard is unquestionably an objective one; the adequacy of notice is not to be decided merely on the basis of the employer's subjective knowledge, but, instead, on what a *reasonable* employer either knew or should have known. Second, the standard specified in *Chambers* compels consideration of *all* of the evidence - "the totality of the circumstances" - which might bear on what a reasonable employer knew or should have known.[4]

In assessing whether a reasonable employer could be said to possess adequate notice of sexual harassment in this particular case, the essential background fact which must be considered was Bennett's bizarre sexual misconduct which occurred on I-275 on August 23, 1995, and the criminal conviction which followed. In assessing whether its workplace was free of any sexually charged hostile environment, a *reasonable* employer would be compelled to take into account the fact that Bennett had engaged in and been convicted of public sexual misconduct.

As will be discussed in the next section of this brief, Ford successfully argued for a directed verdict on the issue of notice because the evidence which Mrs. Elezovic presented on that issue was deemed to lack the specificity necessary to provide Ford with constructive notice of the offensive environment. Thus, Ford was able to secure a directed verdict because the evidence which Mrs. Elezovic presented on the notice question was, in the view of the courts

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[4]As will be discussed in Issue III, *infra*, the Court of Appeals seriously misapplied *Chambers* "totality of the circumstances" test in assessing the adequacy of plaintiff's proofs at trial.

below, ambiguous. But, as other courts have noted, Bennett's indecent exposure conviction and Ford's knowledge of that conviction constituted the type of evidence, "which may help the jury interpret otherwise ambiguous acts." *Hurley v The Atlantic City Police Department*, 174 F3d 95, 111 (3rd Cir. 1999); *Mancini v Township of Teaneck*, 349 NJ Super 527; 794 A2d 185, 206 (2002).

For example,[5] in November 1997 the psychologist with whom Mrs. Elezovic has been treating, Dr. Fran Parker, wrote a letter to Ford's chief medical officer at the Wixom Plant. (Apx. pg. 327a). In that letter, Dr. Parker indicated that Mrs. Elezovic was being treated for "depression and anxiety related to job stress." The letter further indicated that Mrs. Elezovic "continues to feel uncomfortable with Dan Bennett."

In the abstract, Mrs. Elezovic's "uncomfortable" feeling around Bennett might not lead a reasonable employer to the conclusion that sexual harassment was taking place. But, to a reasonable employer who has a supervisor willing to engage in the indecent acts which occurred on I-274 on August 23, 1995, Mrs. Elezovic's "discomfort" in the presence of Bennett can and should mean more.

Similarly, in another letter dated September 19, 1997 (Apx. pg. 325a-326a), Dr. Parker notified Ford personnel that "due to the harassment she perceived from Mr. Bennett, she was losing perspective of herself and descending into mental illness." At trial, Ford made much of the fact that this letter did not mention *sexual* harassment, only harassment. But, where the

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[5]All of the evidence which was admitted at trial bearing on the question of "adequate notice" will be discussed in Issue III, *infra*. Plaintiff will not repeat all of that evidence herein. What plaintiff would stress is that this trial evidence could only properly encompass the totality of the circumstances when considered in conjunction with Bennett's indecent exposure conviction.

supervisor identified as having harassed a subordinate was himself convicted of a sexually charged crime, a *reasonable* employer should not engage in the assumption that the harassment which was described in Dr. Parker's letter was not sexual in nature. A *reasonable* employer aware of the harassment of a female employee by a male supervisor who had been convicted of indecent exposure should be compelled to do something more than ignoring Dr. Parker's letter. Such an employer "has a duty to investigate and take prompt remedial action," *Radtke v Everett*, 442 Mich 368, 397; 501 NW2d 155 (1999), if that investigation revealed that the harassment which Ford had been notified of was, in actuality, harassment of a sexual nature.

At trial, Jerome Rush, Wixom's Labor Relations Supervisor, testified that when an employee comes to him complaining of sexual harassment, a siren would go off in his head. Thus, Mr. Rush confirmed that a reasonable employer would treat a charge of sexual harassment as an issue of utmost importance, requiring a thorough investigation and speedy resolution. But where, as here, the employer is faced with a charge of harassment lodged against a supervisor who has been previously convicted of a crime involving sexual misconduct, something is seriously wrong if the same alarm sirens do not go off when the employer's agents are advised that the same supervisor is engaging in the harassment of a female employee working under him.

Or consider Mrs. Elezovic's August 1998 report to a Labor Relations investigator that she had been in fear when she found herself alone in a room with Bennett. (Apx. pg. 284a) A *reasonable* employer would presumably be interested in the fact that one of its employees is in fear when alone in a room with a particular supervisor. But, a *reasonable* employer who knows that the supervisor who engenders such fear was previously convicted of a crime involving exposing himself to three women and masturbating in public should have a quantifiably different

reaction.

In *Chambers*, this Court stressed that the question of whether the employer received adequate notice to give rise to *respondeat superior* liability must be decided on the totality of the circumstances. In this case, Bennett's conviction was the absolutely essential background fact by which *all* of the trial evidence bearing on notice had to be viewed. The trial court removed this essential part of Mrs. Elezovic's notice evidence by excluding Bennett's indecent exposure conviction in her case against Ford.

The trial court recognized that Bennett's conviction was relevant evidence as it pertained to the notice issue. Nevertheless, the court decided to exclude this evidence under MRE 403. That rule provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
>
> *Id.*, §403.2, p. 319.

MRE 403 calls upon a court to conduct a balancing of the probative value of a evidence and the danger of unfair prejudice which may result from admission of that evidence. It is only if the probative value of that evidence is "substantially outweighed" by the danger of "unfair prejudice" that evidence is to be excluded under this rule.

On one side of the balancing called for by MRE 403, the court had to consider the danger of unfair prejudice *to Ford* associated with the admission of this evidence. In this respect, Ford and Bennett stand in markedly different positions. While Bennett could argue that the jury's knowledge of his misconduct and resulting conviction for indecent exposure might be unfairly

prejudicial to his case, Ford did not have a direct claim to and prejudice. But, it is on the other side of MRE 403's balancing equation where the circuit court and the Court of Appeals seriously erred in excluding this evidence.

As explained in Robison, Longhofer, Ankers, *Michigan Court Rules Practice, Evidence,* the weighing called for by MRE 403 must ultimately be dependant on the importance of the evidence which a party seeks to admit:

> In balancing the various factors, the trial court should use a sliding scale: the less probative the evidence is, the more likely the trial court should be to sustain an objection to its admissibility on Rule 403 grounds.
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> *Id.*, §403.2, p. 319.

This "sliding scale" approach to MRE 403 was embraced by this Court in *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995), where the Court held that Rule 403's "major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of prejudicial effect." *Id.* at 75, citing *United States v McRae*, 593 F.2d 700, 707 (5th Cir. 1979). The Court in *Mills* also adopted the reasoning in *Sclafani v Peter S. Cusimano, Inc.*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983), in which the Court of Appeals noted that the "unfair prejudice" which MRE 403 seeks to prevent involves situations in which "*marginally probative* evidence will be given undue or preemptive weight by the jury." 450 Mich at 75. (emphasis added).

What is critical in this case is that the evidence of Bennett's conviction was not a piece of evidence of "scant probative force" or "marginally probative" to the question of whether a *reasonable* employer would have had notice of Bennett's sexual harassment of Mrs. Elezovic.

Rather, in addressing the totality of the circumstances bearing on the question of "whether a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring," *Chambers,* 463 Mich at 319, evidence of Bennett's conviction represented the essential background fact which should have governed *all* future conduct of a reasonable employer in Ford's position.

Assuming for the moment that the trial court on the basis of the evidence presented at trial properly granted Ford a directed verdict on the notice issue, the fact is that the evidence of Bennett's conviction would have been sufficient to reverse that directed verdict. Thus, assuming, *arguendo*, that the trial court did not err in granting a directed verdict on the notice issue, the evidence of Bennett's conviction and Ford's knowledge of Bennett's acts leading to that conviction was what separated Mrs. Elezovic from having her case submitted to the jury. Ironically, the circuit court appeared to have grasped this critical point. At the pretrial hearing at which the circuit court granted the defendants' motions to exclude this testimony at trial, the court indicated that there might be other methods by which notice to Ford could be proved. (Apx. pg. 68a). The circuit court added, however, "if there's not, I may reconsider the exclusion of this evidence." *Id.* Unfortunately, the circuit court did not revisit this issue when, at the conclusion of the plaintiff's proofs she granted a directed verdict motion on the ground that Mrs. Elezovic had not presented sufficient evidence on the question of notice.

Where, as here, the probative evidence which plaintiff sought to introduce is absolutely essential to make out her case, MRE 403 cannot be employed to exclude that evidence. There can be no balancing under MRE 403 which leads to the conclusion that *essential,* relevant evidence is to be excluded because of a fear of "unfair prejudice" to the opposing party. Where

the proffered evidence is so important that it is essential to a party's case, the probative value of such evidence cannot be "substantially outweighed" by the prospect of unfair prejudice to the opposing party.

This has to be the result dictated by MRE 403. If it is not, it would mean that a plaintiff who possesses sufficient probative evidence to present a claim to a jury may be legally foreclosed from succeeding on that claim based on a court's exclusion of essential evidence because of fear of "unfair prejudice" to the opposing party. MRE 403 can never be employed as a death sentence to a particular cause of action. The trial court abused its discretion in excluding in Mrs. Elezovic's case against Ford evidence of Bennett's freeway escapades on August 23, 1995 and the conviction which followed.

The Court of Appeals rejected plaintiff's argument regarding the circuit court's exclusion of Bennett's conviction. While recognizing that circuit court's decision to exclude this evidence represented a "close question", (Apx. pg.51a), the Court of Appeals concluded that it "could not agree . . . that the evidence was essentially conclusively probative of notice." (Apx. pg. 51a). Regrettably, the Court of Appeals offered no explanation as to how a trier of fact (or a judge deciding a directed verdict motion) could intelligently address the totality of the circumstances concerning what an objectively reasonable employer knew or should have known without considering the evidence pertaining to Bennett's prior arrest and conviction arising out of the I-275 incident. The simple fact is that it was utterly impossible to assess whether Ford knew or should have known of Bennett's harassment of Mrs. Elezovic without reference to evidence concerning Bennett's arrest and conviction for indecent exposure and Ford's knowledge of these facts.

B. The Admissibility Of This Evidence As Against Bennett.

With respect to Mrs. Elezovic's claims against Bennett, the trial court found evidence of his indecent exposure conviction to be inadmissible under MRE 404(b). MRE 404(b) specifies that other wrongs or acts may not be admitted to prove a person's character. The rule is, however, inclusionary, not exclusionary; if the evidence is offered for any purpose other than to prove character, it is admissible. *People v. Vandervlet*, 444 Mich 52, 64; 508 NW2d 114 (1993).

Bennett's conduct on August 23, 1995 and the conviction which followed were admissible under MRE 404(b) based on this Court's decision in *People v. Sabin,* 463 Mich 43; 614 NW2d 888 (2000). In *Sabin*, the Court held:

> . . . evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.
>
> 463 Mich at 63.

The Court went on to find in *Sabin* that uncharged prior acts were admissible in the defendant's criminal trial despite the fact "the uncharged and charged acts were dissimilar in many respects." *Id* at 67.

Following the *Sabin* decision, this Court has twice more rejected any interpretation of that case "that would have required an impermissibly high level of similarity between the proffered other acts evidence and the charged acts." *People v Knox*, 469 Mich 502, 511; 684 NW2d 366 (2004), *citing People v Hine*, 467 Mich 242; 650 NW2d 659 (2002).

Here, Bennett's conduct for which he was arrested and convicted bears similarity to two important aspects of Mrs. Elezovic's case. First, he exposed his penis and masturbated in front

of three girls on I-275 in August 1995, and he did the same to Mrs. Elezovic. Additionally, he pursued the three girls in his car over a considerable distance, much the same as he did to Mrs. Elezovic on three occasions in 1999. Under the Court's analysis in *Sabin*, these similar acts of misconduct should have been held admissible against Bennett.

The Court of Appeals held that this evidence should not have been admitted against Bennett under MRE 404(b) because there was not a sufficiently strong showing of a "concurrence of common features." (Apx. pg. 51a).

The Court of Appeals' approach to the MRE 404(b) issue presented in this case cannot be harmonized with this Court's decisions in *Sabin*, *Knox* and *Hine*. In these cases, this Court has indicated that evidence may be admitted under MRE 404(b) even through the prior acts and the acts at issue are "dissimilar in may respects." *Sabin*, 463 Mich at 67. Applying these decisions to the facts of this case, the Court should reverse the Court of Appeals' ruling affirming the exclusion of this evidence as to Bennett.

III. THE TRIAL COURT ERRED IN GRANTING A DIRECTED VERDICT ON MRS. ELEZOVIC'S CLAIMS FOR SEXUAL HARASSMENT BASED ON THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT.

At the conclusion of the proofs, the trial judge entered a directed verdict on Mrs. Elezovic's hostile environment claim against Ford based on its conclusion that there was insufficient evidence presented on the issue of notice. (Apx. pg. 62a). The Court of Appeals affirmed that ruling. (Apx. pgs. 43a-46a). This Court should reverse these rulings and remand this case for a new trial on this claim.

Through this litigation, Ford has been highly successful in having the courts take each

piece of evidence presented by Mrs. Elezovic bearing on the issue of notice, examine each piece of evidence separately and come to the conclusion that this particular piece of evidence was insufficient to provide Ford with the requisite notice. Ford has, therefore, successfully convinced the courts below to examine each piece of evidence bearing on notice individually to determine if that piece of evidence should have provided notice of "a substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich at 319. Ford's strategy proved particularly effective in the Court of Appeals, which serially considered various pieces of evidence submitted by Mrs. Elezovic on the issue of notice and it deemed each piece of evidence insufficient by itself to provide notice. (Apx. pgs. 44a-45a).

The approach taken by the Court of Appeals in affirming the directed verdict as to Ford is fundamentally at odds with this Court's decision in *Chambers*. In *Chambers*, this Court specifically ruled that an examination into the adequacy of notice in a hostile environment sexual harassment claim demands "a reasonableness inquiry, accomplished by objectively examining the totality of the circumstances." 463 Mich at 319; *see also Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 792; 685 NW2d 391 (2004). It is abundantly clear under *Chambers* that the adequacy of the notice is not to be determined by examining each piece of evidence bearing on that issue in isolation. Instead, this issue can only be decided by considering *all* of the evidence collectively.

Chambers also clearly established that the adequacy of the notice must be decided on the basis of an objective standard, assessing whether a *reasonable* employer should have been aware of "a substantial probability that sexual harassment was occurring." Thus, liability may be imposed on a corporate employer where such a defendant "knew or should have known of the

harassment and failed to take prompt remedial action against the superior." *Radtke*, 442 Mich at 397, n. 46, *citing Steele v Offshore Shipbuilding, Inc.*, 867 F2d 1311, 1316 (11th Cir 1989).

The trial court and the Court of Appeals completely failed to give effect to the principles reflected in *Chambers* and *Radtke*. The Court of Appeals noted that "the trial court granted a directed verdict on the basis that plaintiff failed to establish that Ford had notice of the alleged sexual harassment." (Apx. pg. 44a). The Court of Appeals proceeded to affirm that ruling. Yet, even this basic statement of the issue presented in this case is categorically wrong under *Radtke* and *Chambers*.

The issue in this case is not whether *Ford* had notice of Bennett's harassment of Mrs. Elezovic. The question, instead, is whether a *reasonable employer* under the totality of the circumstances existing in the case either knew or should have known of the probability that harassment was taking place.[6] The Court of Appeals failed to apply even this basic principle to this case.

The Court of Appeals also fundamentally erred in its approach to the notice issue in another important respect. The Court of Appeals spoke repeatedly in its opinion regarding whether Ford had "actual notice" of Bennett's harassment of Mrs. Elezovic. (Apx. pgs. 44a-45a). Under the objective test enunciated in *Chambers*, this emphasis of Ford's "actual notice" is

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[6]The objective standard expressly adopted by this Court in *Chambers* is, of course, necessary to prevent an employer from adopting what might be characterized as an "ostrich" defense to a hostile environment claim. *See e.g. Jonasson v Lutheran Child and Family Services*, 115 F3d 436, 438 (7th Cir. 1997); *Robinson v Jacksonville Shipyards, Inc.*, 760 F Supp 1486, 1530 (MD Fla 1991). An employer cannot remain subjectively oblivious to sexual harassment occurring in its workplace and hope to translate that ignorance into a complete defense to a harassment action. Instead, an employer has an affirmative obligation to "take prompt and adequate remedial action after having been *reasonably* put on notice of the harassment. *Chambers*, 463 Mich at 313.

erroneous. The question to be addressed in this case is not whether Ford (or more appropriately, a reasonable employer) had *actual* notice. Rather, *Chambers* compels consideration of whether a reasonable employer knew *or should have known* of the probability of harassment going on in its workplace.

Actual notice of the harassment under the *Chambers* ruling, while certainly relevant where it exists, is not dispositive of the notice element of a hostile environment claim. Rather, the *Chambers* objective test demands that the trier of fact assess whether a reasonable employer *should have been* aware of the harassment occurring in its workplace.[7]

Applying the appropriate legal standard with respect to notice, this Court should reverse the circuit Court's decision granting a directed verdict to Ford. The evidence presented at trial established that Mrs. Elezovic told two of her supervisors, Mr. Vauble and Mr. Zuback, of the 1995 incident in which Bennett masturbated in front of her (Apx. pgs. 111a-112a). Because of her fear of what Bennett would do to her if she filed a formal charge, Mrs. Elezovic asked her two supervisors to keep this information confidential. Citing Mrs. Elezovic's request that her two supervisors keep this information confidential, the Court of Appeals' dismissed the

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[7]The Court of Appeals' fixation in this case on "actual notice" was perhaps direct result of the Court of Appeals' prior decision in *Sheridan v Forest Hills Public Schools*, 247 Mich App 611; 637 NW2d 536 (2001). The *Sheridan* decision is a bit of a mystery. *Sheridan* is a post-*Chambers* case which resurrected pre-*Chambers* law to support the view that constructive knowledge of sexual harassment could only be established "by showing the persuasiveness of the harassment, which gives rise to the inference of knowledge." 247 Mich App at 625, *citing McCarthy v State Farm Ins Co.*, 170 Mich 451, 457; 428 NW2d 692 (1988). The "persuasiveness" of acts of sexual harassment is, however, only one means by which an employer *should have known* of such harassment. *Sheridan*'s formulation of the constructive notice aspect of a sexual harassment claim simply cannot be harmonized with this Court's decision in *Chambers*.

suggestion that Mrs. Elezovic's statements to her supervisors constituted adequate notice to Ford. (Apx. pg. 44a).

However, in going to Mr. Vaubel and Mr. Zuback, Mrs. Elezovic complied with her obligations under Ford's anti-harassment policy, which provides that an employee can report any claim of sexual harassment "to your supervisor or manager." (Apx. pg. 323a). While Mrs. Elezovic complied with Ford's policies by reporting Bennett's sexual misconduct, her supervisors failed to meet their obligations under these same policies. Whether Mrs. Elezovic went to her supervisors in confidence or not, they were obligated under Ford's polices to report these charges of sexual harassment to the appropriate body within the corporation. Mr. Vaubel confirmed this fact in his trial testimony, acknowledging that if Mrs. Elezovic informed him of the incident in which Bennett masturbated in from of her, he (Vaubel) had an obligation to report that incident to Labor Relations. (Apx. pg. 338a).

Thus, in this case, the employee being harassed did what was required of her under Ford's policies; she brought her complaint of sexual harassment to her supervisors. This information, however, did not go any further through appropriate corporate channels precisely because Mrs. Elezovic's supervisors failed to comply with corporate policy on the subject. In these circumstances, Mrs. Elezovic's reporting of Bennett's harassment to her supervisors should be deemed sufficient to provide Ford with adequate notice.

However, quite apart from Mrs. Elezovic's direct communication with her supervisors, there was a significant body of other evidence from which a reasonable employer *should have known* of the probability that sexual harassment directed against Mrs. Elezovic was taking place.

Mrs. Elezovic's psychologist, Dr. Parker, wrote to Wixom's chief medical officer in

September 1997, describing the plaintiff's severe emotional upset and claiming that Mrs. Elezovic was descending into mental illness, "[d]ue to the harassment she perceived from Bennett . . ." (Apx. pg. 325a). Dr. Parker wrote again two months later, indicating that Mrs. Elezovic "continues to feel uncomfortable with Bennett." (Apx. pg. 327a). In April 1998, Dr. Parker wrote another letter, this one to the Plant Manager, Mr. Haller. In that letter, Dr. Parker advised the plant's ranking supervisor that "there has been harassment going on for the past year and a half at her Wixom plant job." (Apx. pg. 221a).

This evidence represented sufficient proof from which a jury could conclude that a reasonable employer should have known of the existence of sexual harassment at Ford Wixom. There was, however, additional evidence presented on this issue at trial. In August 1998 Mrs. Elezovic reported to a labor relations representative that she had been frightened because Bennett "came near her and no one was around." (Apx. pg. 284a). Presumably, a reasonable employer would want to know why an employee was frightened when alone with a particular supervisor.

Approximately one month later, Mrs. Elezovic had a telephone conversation with the supervisor of Labor Relations, Mr. Rush, in which she complained about Bennett harassing her and nobody was doing anything about it. (Apx. pgs. 292a-293a).

Earlier in 1998, Paul Lulgjuraj, Mrs. Elezovic's son-in-law and an attorney, wrote a letter to Mr. Rush in which he used verbiage of particular import in this context. (Apx. pg. 328a). Mr. Lulgjuraj asserted that he might take legal measures, "to insure that our client is not subjected to working in a hostile environment."

In October 1998, Mrs. Elezovic was removed from her job after expressing homicidal thoughts directed toward Bennett. Ford Wixom personnel reacted with speed to protect one of its

supervisors from a perceived threat of violence. Under the circumstances, it was entirely appropriate for them to do so. But, under the totality of the circumstances it was also entirely appropriate for Ford personnel to delve into the question of what aspect of the relationship between Bennett and Mrs. Elezovic could push Mrs. Elezovic to such extremes that she would entertain these homicidal thoughts in the first place.

There was additional evidence bearing on whether a reasonable employer should have known of the probability of harassment to trigger an investigation. Daniel Welch was a co-employee of Mrs. Elezovic who was aware of Bennett's sexual harassment of the plaintiff. In October 1998 when Mr. Welch was taking a medical leave of absence, he met with Mr. Rush of Wixom's Labor Relations Department . When Mr. Rush inquired when Mr. Welch would be returning to work, Mr. Welch responded that the would not come back until someone did something about the situation between Bennett and Mrs. Elezovic. (Apx. pg. 133a).

Moreover, Ford was sufficiently aware of Bennett's dubious activities that it began an investigation of sorts in 1998. During that year, Bradley Gotee, another of Mrs. Elezovic's co-workers who was aware of her problems with Bennett, was called from his job to meet with a person from Ford's headquarters. In that interview, Mr. Gotee was asked questions about Bennett, specifically whether he "had seen anything in the shop" regarding Bennett.

Chambers instructs that all of this evidence presented at trial had to be considered in its totality in determining whether a reasonable employer should have known of the probability of sexual harassment. Neither the circuit court nor the Court of Appeals undertook the analysis required by *Chambers*. Instead, both the circuit court and the Court of Appeals considered each piece of evidence in isolation to determine whether Ford had adequate notice of the harassment.

This was error.

A directed verdict could only have been entered in this case if no reasonable juror could have concluded under the totality of the existing circumstances that a reasonable employer should have known that sexual harassment was occurring. The trial court and the Court of Appeals never undertook this inquiry. Had they done so and properly followed the dictates of this Court's decisions in *Radtke* and *Chambers*, the courts below would have been required to submit the notice issue to the jury. This is particularly true in light of the fact that all of the evidence presented at trial and all legitimate inferences to be derived from that evidence had to be construed in the light most favorable to the plaintiff. *See Kubczak, supra; Matras, supra.*

For all of these reasons, this Court should reverse the Court of Appeals' decision affirming the entry of a directed verdict in favor of Ford.

IV. THE CIRCUIT COURT ERRED IN ITS PRETRIAL RULING EXCLUDING EVIDENCE OF OTHER SEXUAL HARASSMENT COMPLAINTS AT FORD WIXOM AND FORD'S RESPONSE TO THOSE COMPLAINTS

During the extensive discovery that occurred in this case, counsel for Mrs. Elezovic gained access to numerous sexual harassment complaints which had been filed at Ford Wixom. Based on this information, plaintiff's counsel prepared a database of sexual harassment claims brought at Ford Wixom. (Apx. pg. 330a-331a) That database revealed that a considerable percentage of such claims were filed against management personnel at that plant.

On August 3, 2001, days before the trial was to begin, Ford filed a motion in limine to exclude evidence of other Ford Wixom sexual harassment complaints and Ford's response to these complaints. Over plaintiff's objection, the circuit court granted the defendant's motion.

The court erred in preventing plaintiff from exploring at trial these other charges of sexual harassment. This evidence was of considerable weight in assessing Ford's *respondeat superior* liability for the acts of sexual harassment committed against Mrs. Elezovic for several reasons. First, as noted previously, in assessing the extent of an employer's knowledge of facts relating to sexual harassment, the operative test called for by *Chambers* requires consideration of the totality of the circumstances. 463 Mich at 319. The totality of the circumstances under which Ford Wixom's supervisory staff was operating includes the extensive list of prior complaints of sexual harassment registered at that facility.

Evidence of the substantial number of prior complaints was directly relevant to the respondeat superior theory for another reason. This Court has held that an employee may establish that an employer knew or should have known of sexual harassment by showing the pervasiveness of the harassment. *Gilbert*, 470 Mich at 792. Mrs. Elezovic should have been allowed to establish that there was pervasive sexual harassment at Ford Wixom. Plaintiff was foreclosed from doing so by the court's erroneous pre-trial ruling.

The court's exclusion of this evidence also harmed plaintiff in one additional way. Since the evidence contained in the database was excluded, Ford's witnesses at trial were free to paint a rosy picture of the sexual harassment situation at Ford Wixom. Mr. Rush, the Supervisor of Labor Relations at the plant, testified that the number of sexual harassment complaints which his office receives is "very low in relationship to the other ones." Richard Gross, Ford's Personnel Relations Manager, was able to describe a study which was conducted at a number of Ford facilities, including Wixom, and he was allowed to testify that there were no issues of sexual harassment at that plant which "caused the alarms to go off in terms of there being a problem"

with sexual harassment. (Apx. pg. 269a).

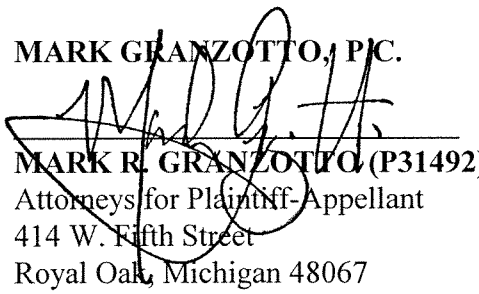
Thus, two of Ford's employees were allowed to give testimony which could have left the jury with the impression that there was no sexual harassment problem at Ford Wixom, a decidedly inaccurate view of the actual situation at that plant.

RELIEF REQUESTED

Based on the foregoing, Plaintiff-Appellant, Lula Elezovic, respectfully requests that this Court grant reverse the Court of Appeals' decision and remand this case to the Wayne County Circuit Court for further proceedings.

Respectfully submitted,

MARK GRANZOTTO, P.C.



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